
IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1941

No. _____ Original

**EX PARTE THE STATE OF TEXAS,
ET AL., PETITIONERS**

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. *The question of whether this Court adjudicated the sufficiency of the Gas Company's evidence to show confiscation.*

Lone Star Gas Company apparently takes the position in its latest brief, filed after the conclusion of the oral argument, that this Court necessarily decided in favor of the sufficiency of the evidence to sustain a judgment of confiscation contrary to the holding of the Court of Civil Appeals upon its first consideration of the case. (Intervener's memoran-

dum, p. 7.) To support this argument, Lone Star Gas Company does not cite anything that this Court says in its opinion, but relies entirely upon statements made by counsel in the briefs when *Lone Star Gas Company v. Texas* was before this Court.

Surely this Court's decision must be determined from what it said in its opinion and not from what counsel may have said in their briefs. The fact that the Gas Company may have argued in its briefs not only that the Court of Civil Appeals failed to consider the over-all evidence but also that the over-all evidence was sufficient to show confiscation, and the further fact that the State of Texas may have undertaken to reply to both points made by the appellant (now intervener), do not prove that this Court decided both points raised by the Gas Company in its favor.

A reading of this Court's opinion shows clearly that what concerned this Court was the failure of the Court of Civil Appeals to consider the evidence on the same basis as the Railroad Commission. This is adverted to by Chief Justice Hughes four times in his statement of the Court of Civil Appeals' holding. (304 U. S. at pages 232, 234, 235, 240-241) It was "this ruling as to the necessity of segregation, and that the sufficiency of appellant's evidence should be determined by that criterion" which was held to be erroneous. (304 U. S. at p. 241) The case was reversed because of "the application of an untenable standard of proof" and the "*disregard of the evi-*

dnce" as to the over-all operations of the Gas Company—not because of an erroneous decision as to the sufficiency of the evidence when judged by the proper standard. (304 U. S. at p. 242) (Emphasis added)

Of course, this Court did point out in this connection that the Gas Company had produced evidence as to its over-all operations in rebuttal of the Commission's findings. This, however, was a decision merely that *there was a question to be decided as to the sufficiency of the evidence by the Court of Civil Appeals by the application of the proper standard of proof*, and not that the Court of Civil Appeals had to hold the evidence to be sufficient. To decide the sufficiency of the evidence before the State Court had done so by the application of the proper standard would not only have been contrary to this Court's usual practice of requiring matters of the sufficiency of the evidence to be first passed upon by the lower courts, but also *would have been an unwarranted invasion of the fact-finding jurisdiction of the Texas Court of Civil Appeals*. The fact that the record involved voluminous and complex technical evidence and the further fact that matters of state law were interwoven with federal questions on the issue of confiscation made it particularly advisable in this case that the State courts first make their decisions upon matters of the sufficiency of the evidence, when judged by the proper standard, before this Court undertook to do so. Hence this Court did not undertake to analyze and weigh the evidence itself, but

remanded it to the Court of Civil Appeals in order that it might do so.

II. *The relation between the construction of the Texas statute (Article 6059) and the construction of this Court's opinion in the decisions of the Court of Civil Appeals and the Texas Supreme Court.*

The decision by this Court that there was a matter of the sufficiency of the evidence to be passed upon by the Texas courts, by the application of the proper standard, was not a decision that the question was one of *fact* rather than of *law* in the sense that the question had to be submitted to a jury instead of being decided by the trial judge. In spite of intimations in the opinion of the Texas Supreme Court to the contrary, (Petition, pages 515, 530) this is clearly a matter of local practice which may be decided either way without infringing any rights under the Federal Constitution. *United Gas Public Service Co. v. Texas*, 303 U. S. 123. It is equally a matter of local practice as to whether the appellate court, upon a review of the district court's decision, can reverse and render a contrary judgment, or whether it can merely reverse and remand the case for another trial. The only requirement of the Federal Constitution in this respect is that the matters of evidence be fairly reviewed by whatever judicial agency is designated for that purpose by the State law. However, the holding of the Supreme Court of Texas is that these matters of *state practice* were decided conclusively in favor of the Gas Company by this Court

so that the Court of Civil Appeals had no power to pass upon the sufficiency of the evidence and reverse the District Court's judgment upon finding the evidence to be insufficient. This decision of the Texas Supreme Court is not dependent upon its construction of the Texas statute, but upon its construction of this Court's opinion, as is apparent from an analysis of the decisions of the Court of Civil Appeals and the Texas Supreme Court after this Court's judgment and mandate had been handed down.

(a) *Decision of the Court of Civil Appeals.*

With regard to the sufficiency of the evidence on the issue of confiscation, the Court of Civil Appeals' holdings were:

(1) That Article 6059 of the Revised Civil Statutes required the conclusion that "in advance of any actual tests of the practical result of the new rate, the court on appeal will not disturb the rate where it is based upon conflicting evidence as to valuations of property or as to any other item used as a basis for the calculation of the rate." (Petition, p. 80) This holding is based upon a construction of the statute and not upon any analysis of the evidence, except a finding that the evidence is conflicting.

(2) That even if Article 6059 does not make the Railroad Commission findings conclusive upon conflicting evidence but on the contrary requires a trial *de novo*, still the evidence in this case was insufficient

to sustain the burden imposed upon the Gas Company to show that the rate order was confiscatory "by clear and satisfactory evidence." This holding required a detailed analysis by the Court of Civil Appeals of all of the evidence relating to the issue of confiscation as applied to the integrated operations of the Company. (See Petition, pages 82-116 and four tables prepared by the Court of Civil Appeals, attached to Petition following page 116) From this careful analysis of the evidence, even assuming that the judicial appeal should be a trial *de novo*, the Court of Civil Appeals concluded "that the validity of the 32-cent city gate rate prescribed by the Commission is (1) conclusively established as a matter of law and (2) factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice." (Petition, p. 116)

(b) *Decision of the Supreme Court of Texas.*

The Supreme Court of Texas points out in its opinion that there are *two* grounds for the Court of Civil Appeals' decision, one of which is dependent on a construction of Article 6059 to the effect that the findings of the Railroad Commission are conclusive if the evidence is conflicting, and the other which assumes that Article 6059 requires a trial *de novo* and is dependent on a holding that the evidence in this case is insufficient as a matter of law to show confiscation. (Petition, pages 504-505) *The Texas Supreme Court expressly recognizes that one of the grounds for the Court of Civil Appeals' decision is*

not dependent upon its construction of Article 6059, but is entirely dependent upon its analysis of the sufficiency of the evidence.

The Texas Supreme Court holds that Article 6059 requires a trial *de novo*, thereby eliminating one of the grounds for the Court of Civil Appeals' judgment. (Petition, p. 533) But the decision of this point did not decide the case. The other point remained; viz., that the evidence in this case was insufficient to show confiscation, even if the trial is *de novo*. The Texas Supreme Court could have decided this point on the merits. It did not do so. On the contrary, without discussing either matters of Texas practice or the sufficiency of the evidence in this case, it held that the matter of the sufficiency of the evidence to show confiscation is not open for decision by this (Texas Supreme) Court, and was not open for decision by the Court of Civil Appeals." (Petition, p. 530. See also pp. 509, 515) The Texas Supreme Court not only held that this Court had determined that there was a fact issue to be passed upon, but further expressly held "that the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company's evidence when considered from the viewpoint of the Company's entire properties, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory." (Petition, p. 509)

There is no effort even now by the respondents or the Gas Company to contend that the Texas Supreme

Court undertook to analyze the evidence or to hold that the Court of Civil Appeals was wrong on the merits in its decision on the sufficiency of the evidence. The *only* reason given in the Texas Supreme Court's *opinion* for its decisions reversing the Court of Civil Appeals on this point is that this Court's decision had foreclosed the question. It has been suggested, however, by respondents (Respondent's return, pp. 11-12) and argued by intervener (Intervener's memorandum, pp. 9-10) that the Texas Supreme Court's construction of Article 6059 in connection with some matter of state practice might have been sufficient basis for the Texas Supreme Court's decision, independent of its construction of this Court's opinion.

In the first place, the Texas Supreme Court's construction of Article 6059 to the effect that it required a trial *de novo* did not eliminate the question of the sufficiency of the evidence; on the contrary it made the decision of this question the crux of the case.

In the second place, the Texas Supreme Court does not decide that the Court of Civil Appeals had no right to reverse and render the decision of the District Court because of any rule of State practice. The *only* reason given for denying this power to the Texas Supreme Court is the construction which the Texas Supreme Court places on the decision of this Court. The Texas Supreme Court is wholly silent in its opinion as to the power of the Court of Civil Appeals, under Texas practice to reverse the decision of the

District Court and render a different judgment. *After the first decision of the Court of Civil Appeals (which also reversed and rendered the judgment of the trial court) the Texas Supreme Court refused an application for writ of error, thereby approving the reasons given for the Court of Civil Appeals judgment as well as the judgment itself.* (See the opinion of the Texas Supreme Court on this point, *Petition*, p. 503) This was necessarily an approval of the action of the Court of Civil Appeals in reversing the judgment of the District Court and rendering a contrary judgment.

The Texas Supreme Court nowhere in its opinion denies the power asserted by the Court of Civil Appeals in its opinion to reverse the findings of the trial judge or jury upon the grounds that the same are not based upon "clear and satisfactory evidence" and then to "render such judgment as the trial court should have rendered under the evidence." (*Petition*, p. 74) The fact that the Court of Civil Appeals had followed the same procedure upon its first consideration of the case and that the Texas Supreme Court then approved its action by refusing the application for a writ of error is highly persuasive that the Texas Supreme Court would hold that the Court of Civil Appeals had this power under State practice. But the Texas Supreme Court not only construed this Court's opinion to hold that "this record does present conflicting evidence on the issue of confiscation," but also,

"It further undoubtedly holds that the Court of Civil Appeals had wrongfully attempted to substitute its findings of fact for the findings of fact made by the trial court on conflicting evidence." (Petition, p. 511) (Emphasis added)

It is perfectly clear from the foregoing quotation as well as those already referred to above, that the Texas Supreme Court placed squarely on this Court the responsibility for holding that the Court of Civil Appeals could not substitute its findings upon the evidence for the findings of the District Court, even where the statute requires proof by "clear and satisfactory evidence."

It is true that the Texas Supreme Court now intimates that it would have reached the same conclusion if it had depended upon a construction of the State statutes. (Respondents' Return, pp. 10-12) What we are concerned with here, however, is what the Texas Supreme Court *did* and not what it *might have done*. If the case is to go off on questions of state practice, petitioners should have an opportunity to brief and argue them before the Texas Supreme Court and that Court should decide them. The responsibility for striking down the rate order should be fairly placed, if the rate order is to be invalidated. We do not think that the rate order should be invalidated under rules of state practice. But at least, if this result is finally reached, it should be reached by a *decision* of the question in the *opinion* of the State Court, and not upon statements in its return to the show-cause order issued by this Court.

III. *Terms of the Supreme Court of Texas*

During oral argument, counsel for petitioners was asked about the terms of the Supreme Court of Texas, and, based on a recollection of the former provisions of Article 5, Section 3, Texas Constitution, and Article 1726, Texas Revised Civil Statutes, counsel stated that the term of court ended in June or July and the new term began in the following October¹. This statement was incorrect, the terms of the Supreme Court of Texas now being fixed by Article 5, Section 3a, Constitution of Texas, which reads as follows:

“The Supreme Court may sit at any time during the year at the seat of the government for the transaction of business and each term thereof shall begin and end with each calendar year.”

The term of the Supreme Court of Texas which began on January 1, 1941, will therefore not end until December 31, 1941.

Respectfully submitted

GERALD C. MANN,
Attorney General of Texas

JAMES P. HART,
Austin, Texas
Attorneys for Petitioners

¹Article 5, Section 3, Texas Constitution formerly provided:

“The Supreme Court shall sit for the transaction of business from the first Monday in October in each year until the last Saturday in June in the next year, inclusive at the Capitol of the State.”

The same provision was formerly made in Article 1726, Texas Revised Civil Statutes.

SUPREME COURT OF THE UNITED STATES.

No. —, Original.—OCTOBER TERM, 1941.

EX PARTE the State of Texas and the Railroad
Commission of Texas, and Ernest O. Thompson,
Jerry Sadler, and Olin Culberson,
members of the Railroad Commission of
Texas, and Gerald C. Mann, Attorney General
of Texas.

[January 12, 1942.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is a motion by the Attorney General and Railroad Commission of the State of Texas for leave to file a petition for a writ of mandamus against the Chief Justice and Associate Justices of the Supreme Court of Texas to bring a judgment of that Court into conformity with the controlling mandate of this Court. The foundation of the motion is the claim that in the proceedings following the remand by this Court to the Texas courts of the litigation in *Lone Star Gas Co. v. Texas*, 304 U. S. 224, the Supreme Court of Texas has misconceived the scope of our decision. The history of the litigation must therefore be summarized.

In 1934 the Railroad Commission of Texas brought an action in the District Court of Travis County, under Article 6059 of the Revised Civil Statutes of Texas, to enforce its order of September 13, 1933, fixing the rate to be charged by the Lone Star Gas Company, a Texas corporation operating pipe lines located in Texas and Oklahoma, for gas delivered to distributing companies in Texas. The Commission's order treated the Company's properties in both states as an "integrated" system. In its answer the Company attacked the order under the Commerce and Due Process Clauses. A trial was held before a jury, which found, from the evidence before it, that the Commission's order was "unreasonable and unjust". Accordingly, the District Court enjoined enforcement of the order. An appeal to the Court of Civil Appeals followed. That court sustained the Commission in treating the Company as an integrated enterprise and found against the Com-

pany upon the issue of confiscation. The burden was put upon the Company "to show by clear and satisfactory evidence a proper segregation of interstate and intrastate properties and business, and to show the value of the property employed in intrastate business or commerce and the compensation it would receive under the rate complained of upon such valuation. Having failed to make a proper segregation of interstate and intrastate properties, appellee [i.e., the Company] did not adduce the quantum and character of proof necessary to establish the invalidity of the rate as being confiscatory, or unreasonable and unjust." 86 S. W. 2d 484, 502. The Court therefore dissolved the injunction of the District Court and declared the Commission's order to be "just, reasonable, and valid in every particular." 86 S. W. 2d 484, 506. The Supreme Court of Texas refused a writ of error and the case then came here.

We reversed the judgment of the Court of Civil Appeals, and remanded the cause "for further proceedings not inconsistent" with the opinion. 304 U. S. 224, 242. It was held: (1) The Commission's order did not offend the Commerce Clause. The Commission was entitled to take into consideration the Company's producing properties in Oklahoma and its transmission lines to Texas, because "the proved manner in which the gas from Oklahoma was treated and handled in Texas made it an integral part of the gas supplied to the Texas communities in appellant's intrastate business". 304 U. S. at 239. (2) On the issue of confiscation the Court of Civil Appeals had erred. The Company "could not be denied the right to introduce evidence as to its property and business as an integrated system and to have the sufficiency of its evidence ascertained by the criterion which the Commission had properly used in the same manner in reaching its conclusion as to the Texas rate." 304 U. S. at 241-42.

When the case came back to the Court of Civil Appeals, it held that "when viewed in the light of the over-all or unsegregated basis and evidence the legislative rate order is valid as a matter of law", and that the validity of the order was established "factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice." And so it again dissolved the injunction and reinstated the Commission's order. 129 S. W. 2d 1161. This time the Supreme Court of Texas granted a writ of error and sent the case back to the District Court for a new trial. 153 S. W. 2d 681.

In its extended opinion the Supreme Court of Texas reviewed these two rulings by the Court of Civil Appeals: (1) Since Article 6059 of the Revised Statutes of Texas,¹ governing judicial review of the Commission's orders, makes the Commission's findings of fact conclusive if supported by substantial evidence, and since the findings were supported by such evidence, the order was valid as a matter of law and left no question for the jury. (2) Even if Article 6059 required a trial *de novo* of all issues of fact, "the Gas Company failed, as a matter of law, to offer evidence sufficient to justify holding this gas rate order confiscatory, or unreasonable and unjust." 153 S. W. 2d at 687.

The Supreme Court of Texas held that Article 6059 does require a trial *de novo* in the District Court. It added that "there is no escape from the conclusion that the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company's evidence, when considered from the viewpoint of the Company's entire properties, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory." 153 S. W. 2d at 689. Later in its opinion the Texas Supreme Court stated "that such opinion [of the Supreme Court of the United States] decides that the evidence contained in this record is sufficient, in law, to invoke the fact finding jurisdiction of the district court. It follows that such matter has been foreclosed by the United States Supreme Court, and is not open for decision by this Court, and was not open for decision by the Court of Civil Appeals." 153 S. W. 2d at 695.

It agreed with the Court of Civil Appeals that the trial court, to the prejudice of the Commission, had erroneously permitted the testimony of a Company witness and refused to exclude various Company exhibits. Immediately following this part of its opinion the Supreme Court of Texas wrote: "It is evident from our holdings above that this case must be remanded to the district court for a new trial." 153 S. W. 2d at 699.

¹ Article 6059 provides: "If any gas utility or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, net or regulation adopted by the Commission, such dissatisfied utility or party may file a petition setting forth the particular cause of objection thereto in a court of competent jurisdiction in Travis County against the Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature and shall be tried and determined as other civil causes in said court. . . . In all trials under this article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, nets or charges complained of are unreasonable and unjust to it or them."

The petitioners read the opinion of the Supreme Court of Texas to mean that the claim of confiscation could no longer be contested in the Texas courts because this Court adjudicated that claim in the Company's favor. Such was not the ruling of this Court. The merits of the claim of confiscation were not reviewed. All that was decided here was that the Company was entitled to make proof of confiscation on the same basis—namely, that of services rendered by an integrated system—as that on which the Commission fixed the rates. On their reading of the opinion of the Supreme Court of Texas, the petitioners were naturally eager for a prompt correction of the decision of that Court, even though it was not final, without waiting for this rate controversy, already eight years old, again to wind its measured way through the Texas courts and then to be brought here on an indubitably federal question, to wit, the proper construction of a mandate of this Court.

The petitioners claim that but for a misapplication of our mandate the Texas Supreme Court might have sustained the Court of Civil Appeals and the litigation could finally have come to an end. Since the opinion of the Texas Supreme Court on its face appeared to be susceptible of the construction given it by the petitioners, we issued a rule to show cause. 314 U. S. —.

In their return, the Chief Justice and Associate Justices of the Supreme Court of Texas state that that Court "would have rendered the same judgment if it had based the same solely upon its construction of the State statute and not at all upon its construction of the opinion of this Court." The return further showed that in remanding the cause to the District Court for a new trial the Supreme Court of Texas acted entirely pursuant to state law: "The Court of Civil Appeals in this State has full power to set aside findings based on conflicting evidence and believed by it to be against the overwhelming weight and preponderance of the evidence and to remand the case for another trial; but it is without power to set aside findings based on conflicting evidence and then make its own findings and render judgment thereon."

We read this return as a disclaimer by the judges of the Supreme Court of Texas of the construction placed upon their opinion by the petitioners insofar as it touches the scope of this Court's ruling in 304 U. S. 224 and the effect of that decision upon the future course of this litigation. Specifically, we read the return

as a disavowal by the Supreme Court of Texas that its action in reversing the Texas Court of Civil Appeals and ordering a new trial implied that our decision adjudicated the claim of confiscation or in any wise forecloses trial of that issue. Therefore, when the litigation goes back to the District Court, it will not be imprisoned within an adjudication to be attributed to this Court which this Court never made. We must accept the return of the Texas judges regarding the scope of judicial review of orders of the Texas Railroad Commission, as well as their showing regarding the distribution of judicial power within the Texas judicial system. These are matters of local law.

The rule will therefore be discharged and the motion denied.

So ordered.

Mr. Justice ROBERTS heard the argument and agreed to the above disposition of the case, but through absence was unable to join in the opinion.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY concur in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.